

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PHILLIP E. STEELE and DONNI STEELE,

Plaintiffs-Appellants,

v

CHARTER TOWNSHIP OF OXFORD,  
ZONING BOARD OF APPEALS OF THE  
CHARTER TOWNSHIP OF OXFORD, and  
MICHAEL C. DARLING, as Zoning Administrator  
and Building Official for the Charter Township of  
Oxford, Jointly and Severally,

Defendants-Appellees.

---

UNPUBLISHED

June 27, 2000

No. 210446

Oakland Circuit Court

LC No. 97-547176-AS

Before: Markey, P.J., and Doctoroff and Murphy, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order of the Oakland Circuit Court, which in part dismissed with prejudice a claim of civil rights violations, alleged against defendants on the basis of defendants' actions in connection with plaintiffs' attempts to secure a lot split for a parcel of property in Oxford Township.

Plaintiffs owned an 11.4 acre parcel of property in Oxford Township. The property was zoned SF-2 (suburban farm), for which Township Ordinance 67 requires a minimum lot size of 5 acres and a minimum lot width of 300 feet. Seeking township approval for a lot split, plaintiffs conducted various negotiations with township officials, specifically defendant Michael Darling, Zoning Administrator and Township Building Official, and submitted four separate proposals for a lot split. Twice, plaintiffs received tentative approval of their proposals only for the approval to be subsequently withdrawn and the proposed lot splits denied.

In furtherance of these tentative approvals, but before each was rescinded, plaintiffs had taken substantial action to their detriment in order to satisfy conditions asserted by defendants as necessary to satisfy zoning ordinances. Specifically, plaintiffs posted a required bond and hired a

contractor who built a private road to provide access to what was the proposed rear parcel. When, following the tentative approval of plaintiffs' fourth proposed lot split, plaintiffs' request for a building permit for the rear parcel was denied, plaintiffs filed both an appeal and a request for a general variance with the Oxford Township Zoning Board of Appeals. Darling contemporaneously filed a request for the ZBA to interpret the lot width provisions of the Ordinance 67. In connection with the parties' petitions, the ZBA conducted three hearings and ultimately certified its findings that none of plaintiffs' proposals satisfied the 300-foot minimum width requirement of Ordinance 67. The ZBA denied plaintiffs' appeal and their request for a variance.

Plaintiffs subsequently filed a claim of appeal and verified complaint with the Oakland Circuit Court. In this single document plaintiffs presented three separate counts, the first pursuant to the circuit court's appellate jurisdiction, the remaining two counts pursuant to the court's original jurisdiction. In Count I, plaintiffs made a claim of appeal from the decision of the ZBA. Seeking a determination that one or both of their most recent proposals satisfied the ordinance requirement for lot width, plaintiffs requested reversal of the ZBA decision denying their appeal, or reversal of the denial of a variance. In Count II, plaintiffs requested that the court enter an order of mandamus against defendant Darling requiring him to issue plaintiffs the requested building permit for the rear parcel. In Count III, plaintiffs raised the claim presently at issue, alleging civil rights violations pursuant to 42 USC 1983. Plaintiffs asserted that defendants' actions of prospectively approving the various proposals, only to later rescind the same after repeatedly reinterpreting Ordinance 67, amounted to action under color of state law denying plaintiffs their civil rights.

The parties each submitted briefs to the circuit court, outlining the entire factual and procedural history at the township level, but addressing only the issue of plaintiffs' appeal from the ZBA decisions. The circuit court conducted a hearing, which also addressed only the issue of plaintiffs' appeal from the ZBA decisions, and subsequently entered an opinion and order holding that the ZBA had abused its discretion in denying plaintiffs a lot split. The order remanded the matter for further proceedings, then stated, "[t]he case is DISMISSED."

Plaintiffs thereafter filed a motion for clarification, requesting that the court separately identify its disposition on plaintiffs' three counts and arguing that Counts II and III had not yet been considered and should be allowed to proceed. The court then issued a second order clarifying its findings. The court first noted that plaintiffs had presented three separate counts in their complaint, then stated:

Appellant's brief thoroughly addressed all of the counts in the underlying complaint. For clarification, the court found as follows: The court remanded Count I for further proceedings. A disposition on Count II, mandamus, would be premature at this time. Finally, Count III, constitutional violations, is without merit. Count III is DISMISSED. Counts I and II are DISMISSED without prejudice.

Plaintiffs now appeal the circuit court's dismissal of Count III. Plaintiffs argue that this dismissal with prejudice, which will act as *res judicata*, was inappropriate because plaintiffs were not on notice that this claim was up for disposition, the parties never briefed or argued the merits of this claim, and the court provided no explanation for its dismissal.

Given the uncommon procedural posture of this dismissal, it occurring in the absence of any motion and without specific consideration or argument by the parties, we first note that we find the circuit court's ruling analogous to a dismissal pursuant to MCR 2.116(C)(8). Accordingly, we will review *de novo* the circuit court's apparent determination that Count III of plaintiffs' complaint failed to state a claim upon which relief may be granted. See *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; the motion may not be supported with documentary evidence. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions which can be drawn from the facts, and construed in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Maiden, supra*. Because here, as in any case, the lack of any record of arguments or findings severely hampers appellate review, we purposely confine our review to the limited question whether plaintiffs' pleadings alone relate claims that could be enforceable on factual development.

42 USC 1983 provides a civil remedy to persons deprived of constitutional rights by individuals acting under color of state law. *Dowerk v Oxford Twp*, 233 Mich App 62, 74; 592 NW2d 724 (1998). To sustain a claim under § 1983, a party must prove that the complained-of conduct was committed by a person acting under color of state law, and that the conduct deprived the party of rights, privileges, or immunities secured by the United States Constitution. *Id.* In this case, plaintiffs' complaint alleges that defendants acted under color of state law at all pertinent times. The complaint also alleges that defendants, by their actions, singled plaintiffs out from all other township property owners and engaged in discriminatory treatment in violation of plaintiffs' rights to due process and equal protection. Plaintiffs allege that defendants violated internal township procedures in rescinding approvals of plaintiffs' proposals for a lot split, that defendants applied the reinterpreted Ordinance 67 only to plaintiffs' lot split, making no effort to review other lot splits asserted to likewise violate the ordinance as now interpreted, and that defendants acted in an arbitrary and capricious manner. By these allegations, plaintiffs effectively pleaded violation of the constitutional rights of procedural and substantive due process and equal protection. Construed broadly, plaintiffs' additional allegations that defendants acted intentionally, with malice, and in concert, arguably relate further claims of First Amendment retaliation and conspiracy to violate civil rights.

Plaintiffs' extensive factual allegations detailing defendants' actions, common to each of the three counts raised in the circuit court, support the pleaded deprivations of constitutional

rights. Accordingly, we conclude that plaintiffs' complaint sufficiently alleged the requisite elements of a § 1983 claim, and provided sufficient supporting facts, such that dismissal for failure to state a claim was inappropriate.

Reversed and remanded. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ Martin M. Doctoroff

/s/ William B. Murphy